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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 01 220 52085 Office: VERMONT SERVICE CENTER Date: 27 FEB 2002

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and
Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

URGENT COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as a software development company. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel submits a brief on behalf of the petitioner, as well as other statements in support of the request for an extension of stay.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

8 C.F.R. 214.2(1)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

- (B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The United States petitioner was incorporated in the year 2000 and states that it is a subsidiary of [REDACTED] located in Gieres, France. The beneficiary is claimed to have been employed by the foreign entity since January 1999 as a General Manager responsible for managing the customer service and marketing departments. The petitioner declares that the beneficiary is the head of its U.S.-based operation and that it generates approximately \$135,000 in gross revenues. The initial petition was approved and was valid from August 15, 2000 to August 14, 2001. The petitioner seeks to extend the petition's validity and the beneficiary's stay for two years.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

Managerial capacity means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior

level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

Executive capacity means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On August 7, 2001, the petitioner was asked for additional information in an attempt to determine whether the petitioner is of such a size as to support a managerial or executive position. Specifically, the petitioner was asked to submit evidence showing that the beneficiary will be relieved from performing the non-managerial, day-to-day operations involved in distributing the software created by the parent company.

Counsel submitted, in part, a number of tax-related documents in response to the Service's request. Such documents consisted of the following:

- 1) a copy of the petitioner's quarterly federal tax return for the quarter ending June 30, 2001;
- 2) a copy of Form WR-1, petitioner's quarterly report of wages ending June 30, 2001. [REDACTED] and the beneficiary were the only employees named. The total of both their wages for the applicable period was \$24,967.42; and

- 3) a copy of petitioner's quarterly wage and withholding report for the quarter ending June 30, 2001. John Lietsch was the only employee named on that form with wages totaling \$22,500.

Counsel also submitted a description and hourly break-down of the beneficiary's duties which included the following:

1. The definition and the implementation of a marketing plan;
2. The hiring of employees to face both the market demand and the business plan;
3. The analysis of the market trends and the detection of new demands.

The chart which included a break-down of the beneficiary's duties, classified his duties into the following four categories: general management, sales, marketing, and customer service. According to the chart only 45 percent of the beneficiary's time will be spent performing what are classified as "general management" duties. Consequently, the director denied the petition, concluding that a majority of the beneficiary's time will be spent in sales, marketing, and customer service, which are not primarily managerial or executive in nature. In fact, a more detailed review of that same chart indicates that approximately one quarter of that 45 percent requires the beneficiary to deal with sales and customer service. In addition, one of the four main categories is titled sales and requires the beneficiary to negotiate prices and meet with customers, both of which can be classified as day-to-day operational duties.

On appeal, counsel submitted a brief asserting, in part, that the Service erroneously used company size as "the determinative factor" in denying the petitioner's request for extension of authorized stay. While counsel accurately concluded that company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other such pertinent factors as the nature of the petitioner's business which, together, can be used as indicators which help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant case, the latter more accurately describes the beneficiary's role. In fact, allowing the beneficiary to focus primarily on managerial or executive duties, would mean that the entire burden of selling Polyspace Technologies' software would presently fall on one sales representative (who is based in the west coast) and one telemarketer. Even with the recent addition of a pre-sales engineer to the petitioner's work force, the responsibility of selling the software would continue to fall on the previously existing, nonmanagerial employees, i.e. the sales representative and the telemarketer, since there is nothing in the job description

of the pre-sales engineer which requires him to actually sell the software. Although counsel claims that the beneficiary's role in the sale of the petitioner's product has decreased in proportion to the increase in sales, there is still, quite clearly a need for the beneficiary's continued involvement in duties that are of a nonmanagerial nature.

Counsel also points to the distinction between the manager who manages a staff and the manager who manages an essential function. He asserts that the beneficiary in the instant case falls under the latter description and as such qualifies for an extension of stay. However, the fact that the beneficiary holds the title of general manager and functions as the key player in selling Polyspace's software in the U.S. market does not automatically mean that his position is one of managerial capacity according to the regulatory definition. Counsel has failed to draw a distinction between one who **manages** an essential function and one who **performs** that function. Contrary to counsel's claim, the beneficiary falls under the latter description. While counsel also compares the instant case to previous cases adjudicated by the Administrative Appeals Office, such cases are unpublished, non-precedent decisions and are therefore not binding on Service employees. 8 C.F.R. 103.3(c). Further, the cited cases in question are individual cases decided on their own merits based on their own records of proceeding. There is not enough information available to determine whether the fact pattern in the present case is the same as in the cases cited by counsel. Thus, there is insufficient evidence to indicate that the beneficiary would be relieved of having to perform nonqualifying duties. The fact that the petitioner is in a preliminary stage of organizational development is considered, but does not relieve it from having to meet statutory requirements.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. While it is apparent that the beneficiary's considerable credentials and experience are tremendous assets to furthering the petitioner's business objectives, it does not appear at this time that the petitioner is prepared to sustain the beneficiary in a strictly managerial or executive capacity. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record does not establish that the beneficiary has been or will be primarily managing the organization, or a department, subdivision, function, or component of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. Meeting with potential clients and personally assisting in the execution of the marketing plans are not considered qualifying activities. The petitioner has not demonstrated that

the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.